

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7524

To be argued by
Bernard Meyerson

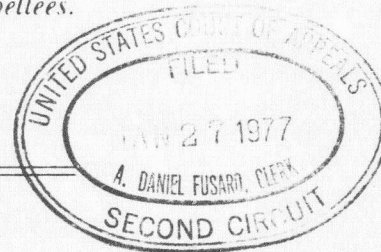
United States Court of Appeals
For the Second Circuit.

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NORTH SHORE TRAVEL SERVICE, Inc.,
Plaintiff-Appellant,
against

JOSEPH F. HINTERSEHR, etc., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York.



REPLY BRIEF OF PLAINTIFF - APPELLANT

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-against-

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REPLY BRIEF OF PLAINTIFF-APPELLANT

POINT I

BY MAKING A MOTION FOR SUMMARY JUDGMENT, BEFORE SERVING THEIR ANSWER, APPELLEES HAVE PREVENTED PLAINTIFF FROM DISCOVERY PROCEEDING AND THEN CLAIMED THAT PLAINTIFF ONLY HAS SUSPICIONS, WHEN THEY WELL KNOW THAT THE KNOWLEDGE OF ITS ACTS, THAT IS NECESSARY TO DEFEAT THE MOTION FOR SUMMARY JUDGMENT, CAN ONLY BE GAINED BY DISCOVERY AND INTERROGATORIES.

Rule 26 [b] reads as follows:

" 11 (b) Scope of Discovery. Unless otherwise limited
12 by order of the court in accordance with these rules,
13 the scope of discovery is as follows:
14 (1) In General. Parties may obtain discovery regard-
15 ing any matter, not privileged, which is relevant to the
16 subject matter involved in the pending action, whether
17 it relates to the claim or defense of the party seeking
18 discovery or to the claim or defense of any other party,
19 including the existence, description, nature, custody, con-
20 dition and location of any books, documents, or other
21 tangible things and the identity and location of persons
22 having knowledge of any discoverable matter. It is not
23 ground for objection that the information sought will
24 be inadmissible at the trial if the information sought
25 appears reasonably calculated to lead to the discovery
26 of admissible evidence. "

In March, 1933, this Court held that an action for damages under the Anti-trust Law is not for a penalty, and a bill of discovery may be maintained. But, of what use is the rule if a defendant can make a motion for summary judgment before the answer is served, and thereby prevent the plaintiff from bringing discovery proceeding or demanding interrogatories ?

There is no doubt that the answers to the Court's claim, that there were allegations of suspicions, only referred to material solely in the knowledge and possession of appellees, and the motion should have been denied on that ground. The New York Court of Appeals has held to this effect, in the case of Proctor & Gamble v. Lawrence Am. Field Warehouse Corp. , 16 NY 2d 344, (the famous "salad oil"

case) where the opinion of Van Voorhis J. , contained the following, on Page 362 :

*** We have held that summary judgment is not justified where there are likely to be defenses that depend upon knowledge in the possession of the party moving for judgment, which might well be disclosed by cross-examination or examination before trial (Kamen v. Metropolitan Life Ins. Co. , 6 AD 2d 406, affd. 6 NY 2d 737; Suslensky v. Metropolitan Life Ins. Co. , 180 Misc. 624, affd. 267 App. Div. 812; West Virginia Pulp & Paper Co. , v. Merchants Mut. Ins. Co. , 10 AD 2d 451 ; 5 Carmody-Wait, New York Practice, p. 145). For this reason, we hold that the Appellate Division correctly decided that a triable issue is presented on the second cause of action whether plaintiff's vegetable oil was converted by the transfer of custody
*** II

POINT II

THE CONSTITUTIONAL QUESTION
WAS PRESSED, UP UNTIL APPELLANT'S
COUNSEL BECAME AWARE THAT THE
WRIT OF REPLEVIN WAS VOID.

This Constitutional question was raised in the New York State Supreme Court and the Appellate Division. The New York Court of Appeals, however, dismissed the appeal to it upon the ground that it did not come within its jurisdiction under CPLR 5601[b], and it, thereafter, refused leave to appeal. The plaintiff herein, then

requested the right to a Constitutional right in the Federal Court until plaintiff's counsel discovered for the first time that the writ was void, whereupon he notified Judge Mishler that he was moving to vacate the entire action in the Supreme Court because of the void writ. Judge Mishler, however, gave his ruling without waiting for further proof.

Appellant, of course, cannot ask for a determination of the Constitutionality of a void and fraudulently issued writ. But, the action taken on a fraudulently issued writ put appellant out of business, and was a violation of Anti-trust Laws.

POINT III

THE MONIES OWED TO APPELLANT WERE PART OF THE SCHEME TO PUT PLAINTIFF OUT OF BUSINESS BY IMPOVERISHING THE CORPORATION.

The sum of \$9,082.90 referred to in plaintiff's cross-motion is not a mere contract action. The loss to plaintiff was caused by a void writ (undertaking not executed by surety, as ordered [127a]), a Newspaper release of the seizure [160a], and then by an agent of appell s who, accompanied by a competitor Travel Agent, called on appellant's accounts and effectively used the Newspaper release to solicit business and to cause the customers to run to appellant for refunds [79a]. Appellees then refused to redeem the tickets returned to them, and caused appellant to run out of funds.

Although, through the many different proceedings prior to the Replevin Trial, appellees had never denied that no monies were owed them by appellant, when appellant submits refunded tickets and later requests payment, long over due, for tickets returned, defendants reply [two weeks before replevin trial] with a claim that plaintiff owes them money [45a] and further, have refused to submit any proof or details to this effect, to plaintiff [126a]. The Replevin Trial revealed that defendant's claim was without merit and that no monies were owed to American Airlines.

The footnote on page 32 of Appellees' Brief is untruthful and misrepresents the issues of the action brought by appellees' co-conspirator, Insurance Company against the Officers of North Shore Travel. The action is solely based on an Indemnity Agreement (signed by North Shore's officers), that the officers are held liable if the Insurance Company pays any money to Appellees, on claims submitted by appellees, regardless of the merit of such claims. (The issue, "Whether North Shore owes the Airlines \$16,991.61 or is owed \$9,082.90 " was not litigated or determined in the decision of Justice Helman.)

Appellees had their co-conspirator pay them \$12,500 on a fictitious claim that showed that, most of the money claimed was owed to American Airlines although, American Airlines' representative testified in the Supreme Court that, no monies were owed them [97a], and further, claim did not reflect and take into account monies owed to plaintiff by defendants.

Therefore, far from determining that appellees do not owe appellant any money, if the New York Appellate Courts sustain this Agreement, appellees will owe this appellant an extra \$12,500 [73a] on top of the \$9,000, which is well over the jurisdictional limitations of The Federal Court.

It certainly is another unlawful act of appellants, in furtherance of their intent to put appellant out of business.

CONCLUSION

APPELLANT SHOULD BE GRANTED THE
RELIEF REQUESTED IN THE MAIN BRIEF.

Respectfully submitted,

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